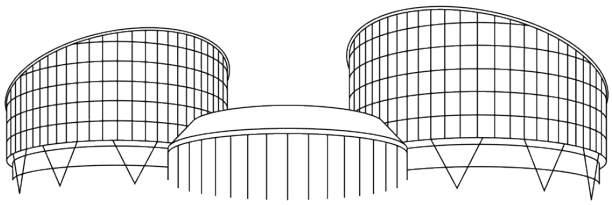

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF ABASHEV v. RUSSIA

(Application no. 9096/09)

JUDGMENT

STRASBOURG

27 June 2013

FINAL

27/09/2013

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Abashev v. Russia,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Isabelle Berro-Lefèvre, *President,*
Elisabeth Steiner,
Khanlar Hajiyev,
Linos-Alexandre Sicilianos,
Erik Møse,
Ksenija Turković,
Dmitry Dedov, *judges,*
and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 4 June 2013,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 9096/09) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Mr Oleg Ivanovich Abashev, on 28 January 2009.

2. The Russian Government ("the Government") were represented by Mr G. Matyushkin, the Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged, in particular, that he was denied an enforceable right to compensation for a period of detention.

4. On 17 June 2010 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1967 and lives in Nizhnevartovsk.

A. The applicant's detention

6. The applicant stood accused of the charge of false denunciation. He gave an undertaking to appear.

7. On 3 April 2006 he was due to appear at a preliminary hearing before the Aleksandrovskiy District Court of the Tomsk Region. At 9.30 a.m. he called the District Court's registry and informed it that he would only be available later in the day because both he and his counsel were involved in concurrent civil proceedings that morning.

8. At 2 p.m. the District Court, sitting in a single-judge formation composed of Judge K., proceeded with the hearing in the applicant's absence. The prosecutor asked the court that the applicant be remanded in custody because he had not shown up at the hearing.

9. The District Court granted the prosecutor's request, finding as follows:

> "The hearing was fixed for 12 a.m. on 3 April 2006, of which the defendant Abashev and counsel Fedoseyeva had been notified in advance, on 6 March 2006, on the court's premises.
>
> However, the defendant Abashev did not appear at the hearing fixed for 12 a.m. on 3 April 2006. By a telephone message received at 9.25 a.m. on that day, he informed the court that his counsel Fedoseyeva was engaged in other proceedings; however, Abashev did not explain the reasons for his failure to appear or produce evidence showing that he had valid reasons for being absent. Nor did he ask that the court examine the charges in his absence.
>
> Under these circumstances, there is every reason to believe that the defendant Abashev has fled from justice. Accordingly, it is necessary to vary the preventive measure from the undertaking to appear to a custodial measure.
>
> In accordance with Article 99 of the Code of Criminal Procedure, the court takes into account the following elements: the defendant Abashev is charged with a minor offence; he has no criminal record; he is married and has a small child who lives in the town of Strezhevoy; according to him, he is unemployed; his health condition is unsatisfactory but does not prevent him from taking part in the trial.
>
> Nevertheless, under these circumstances there is no reason to maintain the initial preventive measure and only a custodial measure would be appropriate for the defendant Abashev."

10. At 4 p.m. on the same day the applicant was taken into custody and placed in the temporary detention centre on the premises of the Aleksandrovskiy district police station. He started a hunger strike in protest. Counsel for the applicant filed an appeal against the detention order; she alleged that Judge K. had been biased against the applicant and that the detention order had not been justified.

11. On 18 May 2006 the Tomsk Regional Court examined and rejected the appeal. Noting that the District Court judge had "attempted to establish

Mr Abashev's whereabouts and the reasons for his failure to appear", it held that the judge had "reasonably arrived at the conclusion that the defendant had absconded".

12. In the meantime, on 14 April 2006 the Aleksandrovskiy District Court held that the applicant would be released if he paid bail of 50,000 Russian roubles (approximately 1,500 euros at the material time). Being unable immediately to pay the bail, the applicant remained in custody until 21 April 2006 when his counsel paid the required amount and the applicant was released.

13. On 29 May 2006 the Tomsk Regional Court quashed the bail decision of 14 April 2006, finding as follows:

> "It follows from the hearing record [of 3 April 2006] that on 3 April 2006, before the opening of the hearing, Mr Abashev had informed the court by telephone that his counsel was engaged in other proceedings ... Abashev has a permanent place of residence which is mentioned in the decision. This indicates that he had not fled from justice, had not evaded appearance at the hearing, and had not breached the conditions of the previously chosen preventive measure. The custodial measure was imposed on Mr Abashev in his absence and also in the absence of his lawyer ... that is, in breach of the requirements of Articles 47, 108 and 253 of the Code of Criminal Procedure.
>
> In these circumstances, the Regional Court considers that the decision of 14 April 2006, which substituted bail for the custodial measure previously imposed – in breach of the law of criminal procedure – and maintained the custodial measure until such time as the bail had been posted, cannot be considered lawful or justified and must be quashed."

14. On 28 June 2006 the Aleksandrovskiy District Court ordered the Tomsk judicial department to return the full amount of bail to the applicant's counsel.

15. On 13 December 2006 the Presidium of the Tomsk Regional Court, by way of supervisory-review proceedings, quashed the detention order of 3 April 2006 and the appeal judgment of 18 May 2006, finding as follows:

> "The Presidium considers that the judicial instances did not fully abide by the requirements of Articles 97, 99 and 110 of the Code of Criminal Procedure in giving decisions on the measure of restraint that was to be imposed on the defendant Mr Abashev.
>
> It follows from the hearing record of 3 April 2006 that the Aleksandrovskiy District Court had been informed that the defendant and his counsel would be delayed on their way to court. Their belated appearance at the hearing cannot be said to constitute an attempt to flee from justice, which would have called for the imposition of a custodial measure."

16. On 10 January 2007 the Aleksandrovskiy District Court convicted the applicant as charged and gave him a suspended prison sentence of one and a half years with two years' probation. On 20 August 2007 the Regional Court upheld the conviction on appeal.

B. Civil proceedings for compensation

17. Relying on the Presidium's decision of 13 December 2006, the applicant sued the Tomsk Regional Treasury and the Ministry of Finance for damage caused by his unlawful detention from 3 to 21 April 2006.

18. On 23 May 2008 the Kirovskiy District Court of Tomsk rejected his claim, finding as follows:

> "Under Article 1070 of the Civil Code, the damage caused by unlawful application of a custodial measure ... must be compensated for in accordance with the procedure established by law. In the context of criminal-law proceedings, this right is regulated in Chapter 18 'Rehabilitation' (Articles 133-139) of the Code of Criminal Procedure ... It follows that the legislature granted the right to claim compensation in respect of non-pecuniary damage only to those who have been cleared of charges ...
>
> However, according to the judgment of the Aleksandrovskiy District Court of 10 January 2007, as confirmed on appeal on 20 August 2007, Mr Abashev was found guilty ... Thus, since the plaintiff was not cleared of charges in accordance with the established criminal-law procedure, there are no legal grounds for satisfying his claim for compensation in respect of non-pecuniary damage."

19. On 29 July 2008 the Tomsk Regional Court upheld the judgment on appeal, relying on the following legal grounds:

> "By virtue of Article 1070 § 2 of the Civil Code, the damage sustained in the framework of the administration of justice must be compensated for if the judge's guilt has been established in a final criminal conviction. The plaintiff did not produce before the court a criminal conviction of Judge K. who had issued the arrest warrant.
>
> The decision by the Presidium of the Tomsk Regional Court of 13 December 2006, to which the plaintiff refers, did not establish that the detention order had been *unlawful* but merely indicated that it had been *unjustified*.
>
> The court cannot accept the plaintiff's reliance on Article 1100 of the Civil Code to the effect that non-pecuniary damage must be compensated for irrespective of the tortfeasor's fault if the damage was caused to an individual by unlawful application of a custodial measure because it is Article 1070 § 2 of the Civil Code that governs compensation for this type of damage sustained in the framework of the administration of justice."

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Civil Code: liability for damage

20. The relevant provisions of the Civil Code read as follows:

Article 1064: General grounds giving rise to liability for damages

"1. Damage inflicted on the person or property of an individual ... shall be compensated for in full by the person who inflicted the damage ...

2. The person who inflicted the damage shall be liable for it unless he proves that the damage was inflicted through no fault of his ..."

Article 1070: Liability for damage caused by unlawful acts of investigating authorities, prosecuting authorities and courts

"1. Damage caused to an individual as a result of unlawful conviction, unlawful institution of criminal proceedings, unlawful application of a preventive measure in the form of placement in custody or an undertaking not to leave the place of residence, or an unlawful administrative penalty in the form of detention or community service shall be compensated in full, irrespective of the fault of the officials or agencies ...

2. ... Damage sustained by an individual in the framework of the administration of justice shall be compensated for provided that the judge's guilt has been established in a final criminal conviction."

Article 1100: Grounds for compensation for non-pecuniary damage

"Compensation for non-pecuniary damage shall be made irrespective of the fault of the tortfeasor when:

... the damage has been caused to an individual as a result of unlawful conviction, unlawful institution of criminal proceedings, unlawful application of a preventive measure in the form of placement in custody or an undertaking not to leave the place of residence ..."

B. Code of Criminal Procedure: the "right to rehabilitation"

21. Article 133 governs the exercise of the "right to rehabilitation" which is, in essence, the restoration of the person to the *status quo ante* following termination or discontinuance of criminal proceedings. This right includes the right to compensation in respect of pecuniary and non-pecuniary damage and the restoration of labour, pension, housing and other rights. The damage must be compensated for in full, irrespective of the fault of the investigator, prosecutor or court (paragraph 1). Paragraph 2 confers the "right to rehabilitation" on defendants who have been acquitted, against whom charges have been dropped, in respect of whom proceedings have been discontinued or whose conviction have been quashed in their entirety or in part. Paragraph 3 provides that "any individual who has been unlawfully subjected to preventive measures in criminal proceedings shall have the right to rehabilitation".

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

22. The applicant complained under Articles 5 and 13 of the Convention that he had been arrested in the absence of any reasonable suspicion that he would flee and that he did not have an effective domestic remedy for his complaint about the unlawful arrest. The Court considers that the applicant's grievances fall to be examined under Article 5 §§ 1 and 5, which read as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so ...
>
> ...
>
> 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

A. Admissibility

1. Date of introduction of the application

23. The Government submitted that the application was inadmissible because it was belated: the final decision in respect of the lawfulness of the applicant's detention was issued by the Presidium of the Regional Court on 13 December 2006 and the final decision in the compensation proceedings was that of the Regional Court of 29 July 2008, whereas, according to date-stamps, the Court did not receive the completed application form until 4 February 2009, that is, more than six months later.

24. The applicant replied that he had introduced the application within the time-limit laid down in the Convention.

25. The Court observes that the application form was signed by the applicant on 28 January 2009 and dispatched on the same date, according to the postmark on the envelope. The Court therefore accepts that date as the date of introduction of the application (compare *Andrushko v. Russia*, no. 4260/04, § 33, 14 October 2010).

2. Admissibility of the complaint about the unlawfulness of the detention

26. As regards the applicant's complaint about the unlawfulness of his detention in April 2006, the Court notes that the most recent decision concerning the validity of the underlying detention order was given on 13 December 2006 (see paragraph 15 above), that is more than six months before the introduction date.

27. It follows that this complaint was lodged out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

3. Admissibility of the complaint about the lack of compensation

28. The Court notes that the applicant's claim for compensation in connection with his unlawful detention was decided upon at last instance on 29 July 2008 (see paragraph 19 above). It is therefore satisfied that this complaint was introduced within the six months preceding the lodging of the application.

29. Referring to Article 133 § 3 of the Code of Criminal Procedure (see paragraph 21 above), the Government claimed that an individual is entitled to apply to a court of general jurisdiction with a claim for compensation in connection with the unlawful application of a custodial measure, even if he or she was ultimately convicted. The Government maintained that the applicant could exercise his right of access to a court and that he could still apply for supervisory review of the judgments issued in the civil proceedings and also petition for recognition of his right to rehabilitation.

30. The Court observes that the applicant did lodge a civil claim, relying, in particular, on the provisions of the section of the Code of Criminal Procedure governing the "right to rehabilitation". His claim was rejected on the ground that the right to claim compensation in respect of non-pecuniary damage was open only to those who had been cleared of all charges, whereas the applicant had been ultimately convicted of a criminal offence (see paragraph 18 above). The Court further reiterates that an application for supervisory review in civil proceedings under Russian law is not an effective remedy to be exhausted (see *Chernichkin v. Russia*, no. 39874/03, § 23, 16 September 2010, and *Denisov v. Russia* (dec.), no. 33408/03, 6 May 2004). It follows that the Government's objection as to the alleged non-exhaustion of domestic remedies must be dismissed.

31. The Court finally notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. Nor is it inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Submissions by the parties

32. In the Government's view, the fact that the outcome of the applicant's claim for compensation was not favourable for him could not be interpreted as indicating the absence of an enforceable right to compensation as required under Article 5 § 5 of the Convention.

33. The applicant maintained his complaint. He pointed out that his health had significantly deteriorated as a consequence of the "dry" hunger-strike (that is, refusing water in addition to food) which he had maintained throughout the entire duration of his allegedly unlawful detention from 3 to 21 April 2006.

2. The Court's assessment

(a) Applicability of Article 5 § 5 of the Convention

34. The Court reiterates that the right to compensation under Article 5 § 5 of the Convention arises if a breach of one of its other four paragraphs has been established, directly or in substance, either by the Court or by the domestic courts (see, among many other authorities, *Stanev v. Bulgaria* [GC], no. 36760/06, § 182, ECHR 2012; *Svetoslav Dimitrov v. Bulgaria*, no. 55861/00, § 76, 7 February 2008; and *Çağdaş Şahin v. Turkey*, no. 28137/02, § 34, 11 April 2006).

35. In the instant case the Court is prevented, by operation of the six-month time-limit (see paragraph 26 above), from examining the period of the applicant's detention in 2006. In these circumstances, it will have to examine the findings of the domestic courts in respect of that period with a view to determining whether they established, expressly or implicitly, a breach of one of the four paragraphs of Article 5 (compare *Shulgin v. Ukraine,* no. 29912/05, §§ 46-47, 8 December 2011).

36. The applicant stood accused of a criminal offence and his arrest on 3 April 2006 was carried out for the purpose of ensuring his attendance at trial, because the District Court considered the custodial measure necessary to prevent him from fleeing. The deprivation of liberty to which he was subjected was therefore covered by sub-paragraph (c) of Article 5 § 1.

37. At a later date, the Presidium of the Regional Court quashed the detention order of 3 April 2006, noting that the District Court had mistakenly interpreted the applicant's absence from the hearing as evidence of his intention to abscond from justice (see paragraph 15 above). Furthermore, in examining the applicant's appeal against the bail decision, the Regional Court held, on 29 May 2006, that the detention order of 3 April 2006 had been issued in the absence of the applicant and his lawyer,

thus breaching various requirements of the domestic rules of criminal procedure (see paragraph 13 above). This indicates that the domestic courts established in substance that the applicant had been deprived of his liberty in a manner that was not in accordance with a procedure prescribed by law, that is, in breach of the requirements of paragraph 1 of Article 5.

38. It follows that Article 5 § 5 is applicable in the instant case.

(b) Compliance with Article 5 § 5 of the Convention

39. The Court reiterates that the effective enjoyment of the right to compensation guaranteed by Article 5 § 5 must be ensured with a sufficient degree of certainty (see *Emin v. the Netherlands*, no. 28260/07, § 22, 29 May 2012; *Stanev*, § 182, and *Shulgin*, § 60, both cited above). This requirement goes hand in hand with the principle that the Convention must guarantee not rights that are theoretical or illusory but rights that are practical and effective (see, *mutatis mutandis*, *Stanev*, cited above, § 231, and *Sakhnovskiy v. Russia* [GC], no. 21272/03, § 97, 2 November 2010). It follows that compensation for detention imposed in breach of the provisions of Article 5 must be not only theoretically available but also accessible in practice to the individual concerned.

40. In the instant case the Russian courts dismissed the applicant's claim for compensation. The Court observes that the Regional Court's judgment of 29 July 2008 referred to the provisions of the Russian Civil Code and, in particular, Article 1070, which governed tort liability of law-enforcement authorities and courts (see paragraphs 19 and 20 above). This Article provides, in its paragraph 1, that an award in respect of damage may be made against the State, without the claimant having to prove the fault of State officials, only in specific exhaustively listed situations, including an *unlawful* application of a custodial measure (compare *Korshunov v. Russia*, no. 38971/06, § 61, 25 October 2007). The interpretation adopted by the Regional Court in the applicant's case was consistent with the textual reading of the Article: the Regional Court held that, since the applicant's detention had been found – in the Presidium's decision of 13 December 2006 – to have been *unjustified* rather than formally *unlawful*, paragraph 1 of Article 1070 did not apply. The Regional Court made no comments on the Regional Court's judgment of 29 May 2006 which established the unlawful imposition of the custodial measure.

41. The Regional Court further noted that, as regards decisions issued in the framework of the administration of justice, in accordance with paragraph 2 of Article 1070, an award of compensation is conditional on the claimant's ability to produce a final criminal conviction of the judge who had issued the contested decision. Thus, the applicant was required to show that Judge K. had been convicted of a wrongful judicial act, which he was unable to do. It is apparent that, by issuing the arrest warrant without sufficient reasoning, Judge K. erred in the assessment of relevant facts but

did not thereby commit any criminally reprehensible act which the applicant could have proven to the required standard of proof.

42. It follows that the manner in which Article 1070 is formulated and applied precluded the applicant from obtaining compensation – whether before or after the findings of the European Court in the present judgment – for the detention that was imposed in breach of Article 5 § 1 of the Convention (see *Makhmudov v. Russia*, no. 35082/04, § 104, 26 July 2007). Having rejected the applicant's compensation claim on essentially formal grounds, the Russian courts did not interpret or apply the domestic law in the spirit of Article 5 of the Convention (see *Shulgin*, cited above, § 65, and *Houtman and Meeus v. Belgium*, no. 22945/07, §§ 45-47, 17 March 2009).

43. The applicant did not therefore have an enforceable right to compensation as is required under Article 5 § 5 of the Convention. There has accordingly been a violation of this provision.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

44. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

45. The applicant claimed 100,000 euros (EUR) in respect of pecuniary and non-pecuniary damage.

46. The Government considered the claim excessive.

47. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. However, it awards the applicant EUR 5,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

48. The applicant did not make a claim in respect of costs and expenses. Accordingly, there is no call to make an award under this head.

C. Default interest

49. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning the applicant's right to compensation for his unlawful detention admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 5 § 5 of the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 5,000 (five thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 27 June 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen Registrar	Isabelle Berro-Lefèvre President